

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**COLETTE R. HEINITZ**  
Claimant

VS.

**U.S.D. 214**  
Respondent

AND

**KANSAS ASSN. OF SCHOOL BOARDS  
WC FUND, INC.**  
Insurance Carrier

Docket No. 1,020,319

**ORDER**

Respondent and its insurance carrier (respondent) request review of the March 22, 2005 Order for Compensation entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

**ISSUES**

The claimant alleges she sustained personal injury as a result of exposure to harmful fumes and/or mold while working for respondent beginning in 2003 until December 14, 2004. Claimant asserts that this repeated exposure has led to her development of asthma and a suppressed immune system which has, in turn, led to fatigue.

The ALJ awarded claimant temporary total disability benefits as well as medical treatment. In doing so, the ALJ implicitly concluded claimant sustained her burden of establishing either an accidental injury arising out of and in the course of her employment or an occupational disease. Unfortunately, the Order does not make any such specific finding as to which theory of recovery under which she awarded benefits. Even more problematic, the Order for Compensation was issued on March 22, 2005, before the

conclusion of Steven Moreland's deposition.<sup>1</sup> Mr. Moreland is an environmental technician who performed testing on the building where claimant had worked.

The respondent requests review of this determination, alleging the ALJ "erred in finding that [c]laimant sustained a personal injury by accident in the course and scope of her employment or an occupational disease."<sup>2</sup> Highly summarized, respondent contends claimant has failed to satisfy her burden of proof with respect to either theory of recovery. Respondent asserts the nature of claimant's employment as a school paraprofessional is not one that carries with it the peculiar hazard of mold exposure. Respondent additionally asserts claimant's present physical complaints are not causally related to her work activities. Thus, under either theory, respondent believes the ALJ's Order should be reversed and set aside.

Claimant argues the ALJ correctly awarded her benefits. She contends the uncontroverted medical testimony of Dr. M.H. Van Strickland establishes that her respiratory and asthmatic problems are due to an exposure to mold and/or from fumes from a Risograph machine, both within the workplace. Whether considered an occupational disease or an accidental injury, claimant maintains she has met her evidentiary burden and the ALJ's Order for Compensation should be affirmed.

The sole issue to be addressed in this appeal is whether claimant sustained a compensable injury or developed an occupational disease from working for respondent in the Sullivan Elementary School.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's Order should be reversed.

Claimant alleges a series of occupational exposures to fumes and/or mold commencing September 2003 and up to December 14, 2004, her last date of work. Claimant was employed as a paraprofessional at Sullivan Elementary School. For the 2003-04 school year her assignments required her to be in various rooms, specifically Rooms 2 and 3. There is no evidence that claimant ever worked in Room 4. She was, however, required to spend a portion of 1-1/2 hours per workweek using a Risograph machine, a mimeograph-type device.

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<sup>1</sup> The first portion, containing the direct examination, was taken on March 16, 2005. The parties adjourned the deposition due to the press of time. The ALJ was informed of this development during the preliminary hearing. Mr. Moreland's deposition was completed on April 4, 2005. It is clear the ALJ did not review the second volume of Mr. Moreland's deposition as the Order was entered March 22, 2005. Neither of the parties' addressed this apparent oversight.

<sup>2</sup> Application for Review at 1.

In September 2003, claimant was using a Risograph and experienced chest pain and tightening as well as shortness of breath. Although claimant believed this to be an isolated event, she mentioned it to her physician who suggested she wear a mask. Respondent provided a mask and permitted claimant to use another Risograph machine located near a window. That alteration did not help, so she returned to her physician who recommended she not use the machine. Respondent honored this recommendation and allowed her to use a copy machine. That too apparently caused her difficulty and she was permitted to forego that activity.

During the next 6 months claimant had no further problems. In February and March 2004, claimant began to notice an increase in her fatigue level. This continued until the end of the school year in May. During the summer claimant testified her symptoms were "much improved."<sup>3</sup> When she returned to work at Sullivan Elementary, claimant testified that she began to experience bronchial spasms. She was no longer assigned to Room 3, the room where she had worked before. Nonetheless, claimant attributed her problems to working in the lower end of the building, where Room 3 and 4 were located.

In March 2004, air and surface sampling was done in Room 3 at Sullivan Elementary School. This sampling revealed the following molds: *Alternaria*, *Cladosporium* and *Bipolaris/Drechslera*. No other molds were revealed as a result of this testing. After the end of the school year, further investigation and testing was done. A small section of a bulletin board was removed from Room 3. A *Stachybotrys*-type mold was identified. The board was removed from the classroom, the area was cleaned in an appropriate manner, and new materials were installed.

Both the Industrial Safety and Health Unit of the Workers Compensation Division for the State of Kansas and a private testing company were called to perform an air quality assessment. The Industrial Safety and Health Unit reported no violations of the applicable regulations.

The private testing company, American Metropolitan Environment, specifically Steven Moreland, performed extensive surface and air sampling of the entire building, including room 3. Mr. Moreland found no *Micropolyspora faeni* or *Thermactinomyces* in the building, nor did he find any evidence of *Stachybotrys* anywhere within the building, except for in Room 4. *Stachybotrys* was found above a suspended ceiling and based upon air sampling, that substance was not airborne. Room 4 does not share an air source with Room 3.

The substance found in Room 4 was abated and given an "all clear" by Mr. Moreland. Nonetheless, claimant refused to perform any duties in this area of the school where Rooms 3 and 4 were located.

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<sup>3</sup> P.H. Trans. at 14.

In October 2004, claimant sought medical treatment with Dr. M.H. Van Strickland, an allergist. Following a battery of tests and a review of the environmental reports done on the Sullivan Elementary School, he diagnosed claimant with asthma and bronchial hyperresponsiveness, which he linked to an environmental problem due to the Risograph odors and/or mold contamination. He indicated in a written report that claimant's abnormal lab tests suggested exposure to *Micropolyspora faeni* and *Thermatinomyces*. He further opined that a mold called *Stachybotrys*, found in Room 3, "could" cause the respiratory symptoms reported by claimant.<sup>4</sup> The October 8, 2004 lab report from IBT Reference Laboratory showed that claimant's test results of *Stachybotrys* panel were within the reference testing range.<sup>5</sup>

Dr. Strickland took claimant off work and at a minimum recommended she be transferred to a different facility. Respondent could not accommodate claimant's request to be reassigned, and on December 14, 2004, she was terminated for failure to perform her job duties.

Following a preliminary hearing, claimant was granted temporary total disability benefits effective December 15, 2004 at a stipulated rate as well as medical benefits. The difficulty here is that the ALJ made no factual finding as to whether claimant had met her burden to establish an accidental injury arising out of and in the course of her employment or an occupational disease. The ALJ made her conclusion before she received the second volume of the deposition of Steven Moreland, the individual who tested the Sullivan Elementary School, even though the parties had advised her at the preliminary hearing that his deposition was yet to be completed.

Curiously, neither party has attacked the ALJ's Order alleging she improperly decided this matter without the benefit of the entirety of Mr. Moreland's deposition testimony. The responsibility for making a record rests with the aggrieved party, here the respondent. For that reason, the Board will press ahead and consider only Volume I of Mr. Moreland's deposition as that is the only evidence offered by the parties and considered by the ALJ.

Whether claimant's condition is ultimately determined to be an occupational disease or an accidental injury, claimant's alleged exposure to the harmful agent continued through her last day of work. Notice is not in dispute, nor are there multiple carriers involved in this claim. Thus, either way, the operative accident date or last injurious exposure if an occupational disease, is December 14, 2004.

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<sup>4</sup> *Id.*, Cl. Ex. 1 at 27 (Oct. 18, 2004 Letter).

<sup>5</sup> *Id.*, Cl. Ex. 1 at 25 (Oct. 8, 2004 Lab Report).

The real dispute, common as between both theories of recovery, is the causation aspect of claimant's ongoing physical complaints. She maintains that either or both the Risograph machine and the mold present in the Sullivan Elementary School building caused her asthma and ongoing problems with fatigue, thus leaving her temporarily and totally disabled and in need of medical treatment. Conversely, respondent concedes there was *Stachybotrys* mold identified in Rooms 3 and 4 of Sullivan Elementary, but that those conditions have been abated. Moreover, respondent asserts that claimant's own medical testing did not reveal a sensitivity to the substances that were identified by the air and surface sampling, nor does Dr. Strickland's opinion that *Stachybotrys* "could" be the source of her respiratory problems meet the requisite evidentiary standards. Finally, the *Stachybotrys* that was found in Room 4 was in an area that, like Room 3, was undisturbed and did not share an air source with Room 3.

The Board finds, after a careful review of the physician's reports and Volume I of the environmental technician's deposition, that the ALJ's Order for Compensation should be reversed. The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>7</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>8</sup>

Here, it is true that Dr. Strickland is the only physician who has weighed in on the causation aspect of claimant's ongoing respiratory problems. He is of the opinion that claimant's problems are attributable to the workplace, specifically, *Stachybotrys* mold and/or Risograph odors. Yet, claimant had not operated a Risograph machine since October of 2003. Her symptoms abated for a period and then re-emerged in February and March of 2004. She then points to the mold within the building as the source of her problems, but the air and surface sampling of rooms where claimant worked revealed no substances in abnormal levels to which she was sensitive. The air sampling done before and after the remediation of the *Stachybotrys* mold in Room 3 showed no exposure to the occupants. And claimant never worked in Room 4, nor was there any evidence of surface or air exposure to the occupants of Room 4, nor do her own test results reveal a sensitivity

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<sup>6</sup> K.S.A. 44-501(a).

<sup>7</sup> K.S.A. 2004 Supp. 44-508(g).

<sup>8</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

to Stachybotrys. Finally, Mr. Moreland testified that this building is not what he would call a "sick building" as it has been cleared by both himself and the state for occupancy.

While it is uncontroverted that claimant bears a sensitivity to certain substances and intermittently has respiratory problems, there is an insufficiency of evidence at this juncture of the proceedings to persuade the Board that her present complaints are work-related, either through an exposure constituting accidental injury or as an occupational disease. Accordingly, the ALJ's Order for Compensation is reversed.

Preliminary hearing findings are not binding and may be modified in a full hearing of the claim.<sup>9</sup>

**WHEREFORE**, it is the finding, decision and order of the Board that the Order for Compensation of Administrative Law Judge Pamela J. Fuller dated March 22, 2005, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2005.

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BOARD MEMBER

c: James A. Cline, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>9</sup> K.S.A. 44-534a(a)(2).